Supreme Court, U.S.
FILED

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No. _____
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IN THE
UNITED STATES SUPREME COURT

OCTOBER TERM, 2003

JOSEPH P. FUZY,

PETITIONER,

V.

S & B ENGINEERS AND CONSTRUCTORS, LTD.

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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35 pp

QUESTIONS PRESENTED

1. Is a job applicant who alleges injury because of an employer's use of exclusionary qualification standards and criteria entitled to relief under the Americans with Disabilities Act of 1990, 42 U.S.C. 1201 et seq, ("ADA")?

2. Is the Fifth Circuit obeying *Reeves v. Sanderson Plumbing Products, Inc.*?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1 Joseph P. Fuzy, plaintiff-appellant

2. Lila Tritico Hogan and Thomas J. Hogan, Jr., Hogan & Hogan, counsel for appellant

3 Charles C. Garrison, counsel for appellee

4. Employees and officer of S & B Engineers & Constructors, Ltd. Identified in this litigation:

Glen A. Rust
Emily Carpenter
Kenneth H. Miller
Mike C. Daigle
Dr. W.A. Brookshire
J.G. Slaughter, Jr.

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IN THE
SUPREME COURT OF THE UNITED STATES OF AMERICA
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 332 F.3d 301(5th Cir. 2003) and is reprinted at Appendix A. The denial of rehearing en banc is reprinted at Appendix B. The order of the United States District Court for the Middle District of Louisiana is unpublished and is reprinted at Appendix C.

STATEMENT OF JURISDICTION

The Fifth Circuit issued its opinion on May 23, 2003. Petitioner's application for Rehearing En Banc was denied July 30, 2003. This petition for a writ of certiorari is timely because Petitioner has filed it within 90 days of July 30, 2003. This Court has jurisdiction under 28 U.S.C.§ 1254(1).

The basis of jurisdiction in the District Court is federal question as provided by 28 U.S.C.§ 1331.

STATUTORY PROVISION INVOLVED

42 U.S.C.§ 12112(d)(2)(B) provides:

> **Acceptable inquiry.** A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

STATEMENT OF THE CASE

I. Overview of the Case

The Fifth Circuit refused to grant a remedy to a non-disabled person injured because of a violation of the Americans with Disabilities Act. The District Court never made a finding of fact concerning the lifting requirement. The Court of Appeals had no legal basis for deciding that Fuzy had not sufficiently controverted the lifting requirement which S & B cited as its sole reason for denying Fuzy employment.

The Fifth Circuit does not yet realize that this Court's mandate in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S.133 (2000) means that courts must disregard evidence that is disputed. The Fifth Circuit must reach the standing issue. This court should remand the case to the district court for briefing, argument, and decision on whether the lifting requirement was job-related.

II. Background of the case

On our about March 2, 1999, Fuzy applied for employment with S & B as a pipe fitter. S & B offered Fuzy employment provided he satisfactorily complete a post-offer functional capacity evaluation ("FCE").

Worksteps, Inc., a third party testing service administered the FCE. Fuzy was required to complete a medical history form[1] and to take various physical capacity tests, one of which involved testing Fuzy's ability to lift weight. Fuzy was able to lift 92 pounds unassisted.

The Dictionary of Occupational Titles ("DOT") provides that the job description of pipe fitter is in the Heavy Category and has a physical demand level of 100 pounds.[2]

S & B denied Fuzy's application solely on his inability to meet the physical demand level of the job as specified in the DOT.[3]

Fuzy filed a complaint alleging that S & B violated the Americans with Disabilities Act ("ADA") and the companion state law, LSA-RS 23:322, by denying his application for employment solely because he failed to satisfy the lifting requirement.

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[1] Exhibit 2, Defendants' Motion for Summary Judgment, 1R. 84.

[2] Affidavit of Glen Rust, 1R. 82.

[3] Id.

S & B moved for summary judgment on both claims and argued that Fuzy was not disabled within the meaning of the ADA. S & B did not argue that the lifting requirement was job-related.

The District Court rule that Fuzy's failure to prove that he was a disabled person precluded any further inquiry. The District Court made no finding of fact concerning the lifting requirement. The District Court granted the motion for summary judgment in a ruling dated February 11, 2002.

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the decision of the district court. The Fifth Circuit assumed, arguendo, that a non-disabled person had standing to sue, but then ruled that Fuzy had failed to "adequately rebut" S & B's summary judgment evidence.

Fuzy's application for rehearing en banc was denied. Fuzy then timely applied to this Court for relief.

REASONS FOR GRANTING THE PETITION

I.

WHETHER A NON-DISABLED PERSON HAS STANDING TO SUE UNDER THE AMERICANS WITH DISABILITIES ACT IS A QUESTION THAT SHOULD BE ANSWERED BY THIS COURT

Any job applicant who alleges that an employer's use of exclusionary qualification standards and criteria denies that person employment is entitled to relief under the ADA. This right has been clearly established in the Eighth Circuit, the Ninth Circuit and the Tenth Circuit.[4]

The Court of Appeals is well aware that the right exists, but continues to resist its application in the Fifth Circuit.[5]

The Court of Appeals turned a blind eye to a clear case of "exclusionary qualification standards and criteria"[6] by continuing to insist that the ADA is for the disabled only and the "failure" of the plaintiff to prove disability is fatal.

The remedial purposes of the ADA cannot be accomplished unless this Court makes clear that the ADA applies to any denial of employment through the use of exclusionary qualification standards and criteria. **Employer conduct** is the issue, not job applicant disability. A complaint alleging an injury because of an ADA violation must be heard by the fact-finder.

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[4] *Cossette v. Minnesota Power & Light*, 188 F. 3d 964 (8th Cir 1999); *Fredenburg v. Contra Costa County Department of Health Services*, 172 F. 3d 1176 (9th Cir. 1999); *Griffin v. Steeltek, Inc.*, 160 F. 3d 591 (10th Cir. 1998).

[5] *Buchanan v. City of San Antonio*, 85 F. 3d 196 (5th Cir. 1996).

[6] 42 U.S.C. § 12101 (5).

Courts have recognized that the class of persons protected by remedial legislation in some cases includes persons outside the class. In *Gladstone Realtors v. Bellwood,* 441 U.S. 103 (1979) this court recognized the right of white residents to sue for violations of the Fair Housing Act in their neighborhood.

It is settled that a plaintiff need not be black in order to state a cause of action under 42 U.S.C. § 1981 or § 1982. *Sullivan v. Little Hunting Park,* 396 U.S.229 (1969).

In this case, Fuzy alleged that S & B used exclusionary qualification standards and criteria to deny his employment application. S & B admitted that Fuzy was not hired solely because he failed to meet the lifting requirement. Fuzy stated a cause of action and his case must proceed to trial.

The Court of Appeals threw the baby out with the bath water. Instead of calling this employer down for its blatant violation of the ADA, the Court of Appeals chastised the victim. S & B must explain the inconsistency between its selection criteria and its routine safety practices. Courts will persist in such errors unless this Court makes clear that anyone injured by such conduct has standing to sue under the ADA.

II.

REEVES IS NOT LAW IN THE FIFTH CIRCUIT

Reeves teaches that a court's decision on a motion for summary judgment must be the product of a careful analysis of all the evidence in the record. All reasonable inferences from that evidence must be drawn in favor of the non-moving party. Evidence favorable to the moving party that the jury is not required to believe must be disregarded. The court must not make credibility determinations or weigh the evidence.

The Court of Appeals decision in this case cannot be reconciled with *Reeves*. The Court of Appeals reached an issue that was not ripe for decision, took on the role of advocate for S & B, lowered their evidentiary burden, disregarded evidence favorable to Fuzy, accepted mover's evidence which was disputed, weighed the evidence and, not surprisingly, found Fuzy wanting.

The legality of the lifting requirement is not fully developed in the record. S & B is the employer, not Fuzy. S & B had the burden to show that the lifting requirement is job-related. S & B had to prove that the ability being tested-lift 100 pounds unassisted-is an **essential function of the job of pipe fitter.**

In deciding whether a function is essential, a court may consider a variety of factors including, but not limited to, (1) the employer's judgment as to which functions are essential; (2) written job descriptions prepared before advertising or interviewing applicants for the job; (3) the amount to time spent on the job performing the function; and (4) the work experience of both past and current employees in the job.

Kapche v. City of San Antonio, 176 F.3d 840, 843 (5th Cir. 1999).

S & B never argued that the lifting requirement was related to the job for which Fuzy applied. No matter. The Court of Appeals made the argument for S & B and dispensed with the *Kapche* analysis altogether by jumping to the conclusion that the "tests were permissible because it related to an essential function of the job."[7]

After having put words into S & B's mouth, the Court of Appeals tinkered with S & B's burden of persuasion and knocked it down to one of mere production. The Court of Appeals contented itself with the self-serving utterances of S & B's safety manager and ignored the contradiction presented by the inconsistent statements in S & B's safety manual. Appendix D. S & B's evidence should have been disregarded.

Third, the Court of Appeals "weighed" the evidence and concluded that Fuzy failed to "adequately rebut" S & B's summary judgment evidence. In reaching this conclusion, the Court of Appeals ignored the conflict between the lifting requirement and S & B's safety manual which unequivocally states that no employee is required to lift more than fifty pounds unassisted. Appendix D.

The Court of Appeals credited Fuzy's testimony about his years of service in the industrial construction field and about his familiarity with construction manuals and policies of many employers[8], but disregarded Fuzy's uncontradicted testimony that the prohibition against lifting more than 50 pounds unassisted is an industry-wide safety practice. At no

[7] Appendix 2a.

time had Fuzy ever encountered a situation where he was required to lift more than 50 pounds unassisted prior to applying for employment with S & B.[9]

A reasonable jury could conclude that S & B's safety practices are a reliable indicator of S & B's judgment that the ability to lift 100 pounds unassisted is unrelated to the job of a pipe fitter. The jury could conclude that S & B's failure to produce a written job description for the job of pipe fitter creates an inference that no such job description exists, or if it does exist, it does not favor S & B's position. The jury could accept as credible Fuzy's uncontradicted testimony that he was never required to lift more than 50 pounds unassisted prior to applying for employment with S & B. The jury could disregard S & B's reliance on the Dictionary of Occupational Titles.

Taking into account all of the summary judgment evidence in the record, a reasonable jury could conclude that the lifting requirement is not an essential function of the job of pipe fitter.

S & B does not require its employees to satisfy the lifting requirement on the job. No other employer in the industrial construction field imposes such a lifting requirement. The lifting requirement appears only in S & B's hiring process and its only purpose is to systematically deny employment to both disabled and non-disabled persons. This discriminatory ruse must be halted.

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[8] Appendix 1a.

[9] Plaintiff's deposition, page 59 lines 18-23.

CONCLUSION

Selection criteria must be job-related. When such criteria are at issue, the focus of the inquiry is on the conduct of the employer and not on the status of the plaintiff. It is the employer's burden to demonstrate that the selection criteria are job-related.

Any person who alleges that an employer used exclusionary qualification standards and criteria to deny that person employment is entitled to relief under the ADA.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 02-30472

U.S. Court of Appeals
Fifth Circuit
FILED
May 23, 2003
Charles R. Fulbruge III
Clerk

JOSEPH P. FUZY,

Plaintiff-Appellant,

VERSUS

S&B ENGINEERS & CONSTRUCTORS, LTD

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA

Before DeMOSS, and STEWART, Circuit Judges, and FALLON [1], District Judge.

DeMOSS, Circuit Judge:

On or about March 22, 1999, Joseph P. Fuzy applied for a job with S & B Constructors, Ltd. ("S&B") as a pipefitter. Fuzy had extensive experience as a pipefitter but also had a history of injuries to his left knee. However, Fuzy had never been unable to physically perform any job due to his injury nor has a physician ever placed him on a work restriction due

[1] District Judge of the Eastern District of Louisiana, sitting by designation.

to the injury. Additionally, Fuzy has never been told by a physician that he is disabled. Fuzy was given a conditional offer of employment from S&B, but was required to satisfactorily complete a physical capacity evaluation and a drug screen performed by a third-party testing service before his offer could be finalized. During the physical examination, Fuzy was asked to complete a medical history form and to perform various physical capacity tests. One test measured Fuzy's ability to lift 100 pounds unassisted, because under the Department of Labor's Dictionary of Occupational Titles, the job of pipefitter is placed in the heavy category with a physical demand level of 100 pounds. Fuzy was only able to lift 92 pounds and subsequently was not hired as a pipefitter.

Fuzy sued S&B claiming that they violated the Americans with Disabilities Act, and a similar Louisiana anti-discrimination law, by denying his application for employment solely on the basis of his failure to satisfy the lifting requirement. S&B moved for summary judgment on both claims, arguing that Fuzy was not "disabled" within the meaning of the ADA and that, even if he did have standing to sue under the ADA, the tests used were permissible because it related to an essential function of the job. The district court granted S&B summary judgment and Fuzy appealed.

This Court reviews a grant of summary judgment de novo . **Mowbray v. Cameron County, Tex.** , 274 F.3d 269, 278 (5th Cir. 2001). Summary judgment is only appropriate when the record indicates "no genuine issue as to any material fact," and when "the moving party is entitled to judgment as a matter of law." Fed, R. Civ. P. 56(c). On appeal, Fuzy only argues that the district court erred in denying his ADA claims under 42 U.S.C. § 12112(b)(6) and under § 12112(d). He therefore waives his other claims including his claims under

Louisiana state law. **Yohey v. Collins**, 985 F.2d 222, 224-225 (5th Cir. 1993) (holding that arguments not briefed on appeal are abandoned). Fuzy also does not contest the district court's finding that he is not disabled within the meaning of the ADA, but rather, asserts that it erred in not allowing him to move forward with his claim despite the fact that he is not disabled. Fuzy bases his argument on this Court's decision in **Armstrong v. Turner Indus.**, 141 F.3d 554 (5th Cir. 1998), and on the Tenth Circuit's decision in **Griffin v. Steeltek**, Inc., 160 F.3d 591 (10th Cir. 1998).[2]

"The ADA prohibits an employer from using qualification standards that screen out a disabled individual or class." **EEOC v. Exxon Corp.**, 203 F.3d 871, 872 (5th Cir. 2000) (citing 42 U.S.C. § 12112(b)(6) (1999)). As Fuzy concedes that he is not disabled, he has no standing to sue under § 12112(b). This leaves Fuzy with only the argument that he may sue under §12112(d) despite the fact that he is not disabled. As to this argument, Fuzy is correct in noting that the Tenth Circuit has recognized that a non-disabled person may still maintain a cause of action under § 12112(d). **Griffin**, 160 F.3d at 594; see also **Cossette v. Minnesota Power & Light**, 188 F.3d 964 (8th Cir. 1999); **Fredenburg v. Contra Costa Cty. Dept. of Health Serv.**, 172 F.3d 1176 (9th Cir. 1999). However, this Circuit has yet to reach this issue. In **Armstrong**, a panel of this Court specifically left open the question of whether or not the language of § 12112(d) would permit a non-disabled person from bringing

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[2] It is arguable that Fuzy has even waived these arguments. Fuzy's brief only mentions **Griffin** in the request for oral argument and his citations under this argument's heading are scant. Also, Fuzy's original complaint makes no mention, specifically, of §12112(d) and the language used in the complaint almost exactly mirrors the language of §12112(a) and (b). However, in his motion opposing summary judgment, Fuzy cites to **Armstrong** as a defense which arguably indicates that Fuzy was indeed attempting to sue under §12112(d) as well.

suit. **Armstrong**, 141 F.3d at 558. The Court instead found that, even assuming *arguendo* that such a claim could be brought under § 12112(d)(2)(A), the plaintiff in that case had failed to demonstrate any injury that could be redressed by damages. ***Id***. The Court therefore concluded that the plaintiff lacked standing to seek declaratory and injunctive relief and that dismissal was proper "whether or not in some other context a nondisabled individual might be afforded judicial relief in respect to a section 12112(d)(2)(A) violation." ***Id***.

Like the Court in **Armstrong**, we also reserve judgement on whether § 12112(d) permits a non-disabled person to bring suit. We do so because, even assuming *arguendo* that Fuzy could bring such a suit, his claim would still fail. S&G presented summary judgment evidence that the 100 pound lifting requirement was job related and Fuzy failed to adequately rebut this evidence. Under §12112(d)(4)(A) and (B), an employer may inquire and make medical examinations if they are shown to be job-related and consistent with business necessity. Therefore, even if this Court assumes, without deciding, that a person who is not disabled may assert a claim against an employer or prospective employer for noncompliance with particular provisions of § 12112, we must still affirm the district court's dismissal because Fuzy has not raised a genuine issue of material fact that the weight lifting test was not a job related function as to the pipefitting job for which he sought employment.

The district court's grant of summary judgment is therefore AFFIRMED.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

U.S. Court of Appeals
Fifth Circuit
FILED
July 30, 2003
Charles R. Fulbruge III
Clerk

No. 02-30472

JOSEPH P. FUZY

Plaintiff – Appellant

v.

S & B ENGINEERS AND CONSTRUCTORS LTD

Defendant – Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA, BATON ROUGE

ON PETITION FOR REHEARING EN BANC
(Opinion May 23, 2003, 5 Cir., _____, _____ F.3d_____)

Before DeMOSS, and STEWART, Circuit Judges, and FALLON*, District Judge.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the petition for Panel Rehearing

is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Signed / Harold R. DeMoss
United States Circuit Judge

*District Judge of the Eastern District of Louisiana, sitting by designation.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

JOSEPH P. FUZY
VERSUS
S&B ENGINEERS AND
CONSTRUCTORS, LTD

CIVIL ACTION
NO. 00-697-A
Filed USDC, Middle Dist. of LA
02 FEB11 P.M. 2:19

RULING ON MOTION
FOR SUMMARY JUDGMENT

This matter is before the court on a motion by defendant, S&B Engineers and Constructors, Ltd. (S&B) for summary judgment (Doc. 11). Plaintiff, Joseph P. Fuzy, opposes the motion. Jurisdiction is based upon a federal question, 28 U.S.C. § 1331, under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq.,and supplemental jurisdiction, 28 U.S.C. § 1367.

In this action under the ADA and state anti-discrimination law, plaintiff alleges that defendant unlawfully failed or refused to hire plaintiff on the basis of disability. Defendant seeks summary judgment in its favor on the grounds that plaintiff has failed to establish a physical impairment as defined under the ADA for a cause of action to arise.

Undisputed Facts

Plaintiff failed to comply with Local Rule 56.2M which requires a separate, short and concise statement of material facts as to which there exists a genuine

issue to be tried. Accordingly, all material facts set forth in the defendant's statement of undisputed facts are deemed admitted for purposes of this motion for summary judgment. These facts are:

1. On or about March 22, 1999, Joseph P. Fuzy applied for employment as a pipefitter with S & B Engineers and Constructors, Ltd.
2. Fuzy was given a conditional offer of employment following which he underwent a post-offer employment physical capacity evaluation and drug screen.
3. The physical evaluation took place at Ascension Physical Therapy Specialists in Gonzales, Louisiana.
4. Fuzy did not complete one of the physical capacity tests and was not hired as a pipefitter.
5. Fuzy injured his left knee in 1968 when he twisted his knee on the job.
6. Fuzy had injury on the left knee in 1992 and returned to work without restrictions from his treating physician.
7. Fuzy received diver training in 1973 and went to South Louisiana to work as an offshore diver.
8. Fuzy's left knee did not interfere with his training or occupation as a diver.
9. Fuzy took a radar course in 1983 and there after began work on an offshore supply boat.
10. Fuzy went to work in construction in 1990 when work in the oilfield slowed down.
11. Prior to applying at S & B, Fuzy worked as a pipefitter for a number of different construction companies.
12. Fuzy has never been unable to perform any job he was required to do.
13. No physician ever placed any work restrictions on Fuzy prior to March 22, 1999.
14. None of Fuzy's day to day activities were limited by his left knee before March 22, 1999.
15. No doctor ever told Fuzy before March 22, 1999, that he was disabled.

Argument

In support of the motion for summary judgment, defendant argues that there is no direct evidence of unlawful discrimination. Defendant argues that plaintiff has not demonstrated a major life activity that was affected by plaintiff's arthritic left knee prior to his application for employment. Defendant argues that it had no reason to believe that plaintiff was disabled nor did S & B "regard" plaintiff as being disabled.

In opposition, plaintiff argues that S & B regarded plaintiff as disabled in the major life activity of working because of his physical condition. Plaintiff argues that S & B regarded him as unable to perform any job with a "Physical Demand Level" of "Heavy Work" as defined by the Dictionary of Occupational Titles. Plaintiff further argues that the functional capacity evaluation conducted by S & B is unrelated to the job of pipefitter and is not required by any business necessity. Plaintiff argues that the "Heavy Work" standard employed by S & B is not related to their daily practices or to industry practices. Plaintiff argues that the ability to lift 100 pounds unassisted is not an essential job function of a pipefitter. Further, plaintiff argues that defendant failed to provide him with reasonable accommodation when plaintiff indicated a possible need for accommodation.

Law and Discussion

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[1] The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case.[2] After a proper motion for summary judgment is made, the non-movant must set forth specific facts showing that there is a genuine issue for trail. The non-movant must produce more than a mere scintilla of evidence in its favor, and may not rest upon mere allegation or denials of its pleading.[3] The court must resolve all factual inferences in favor of plaintiff.[4]

Under the ADA, an aggrieved employee must comply with administrative prerequisites, which include filing a timely charge of discrimination with the EEOC and receiving a right to sue letter before filing suit in the district court,[5] with which prerequisites plaintiff complied.

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[1] Fed. Rule Civ. P. 56 (c).

[2] **Celotex Corp. v. Catrett,** 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L.Ed. 2d 265 (1986).

[3] **Anderson v. Liberty Lobby, Inc.,** 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986).

[4] **Abbott v. Equity Group, Inc.,** 2 F.3d 613 (5th Cir. 1993).

[5] **Dao v. Auchan Hypermarket,** 96 F.3d 787, 789 (5th Cir. 1996).

To establish a prima facie case of intentional disability employment discrimination under the ADA,[6] plaintiff must come forward with evidence tending to show that:

1) plaintiff was an individual "with a disability" under the ADA;

2) plaintiff was qualified for the job in question; and

3) an adverse employment action was taken because of his disability.[7]

The threshold issue in a plaintiff's prima facie case is a showing that he suffers from a disability protected by the ADA,[8] which confers a special meaning to the term "disability":

1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

2) a record of such an impairment; or

3) being regarded as having such an impairment.[9]

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[6] Louisiana law closely follows the ADA wording and jurisprudence.

[7] **Robertson v. Neuromedical Center**, 161 F.3d 292, 294 (5th Cir. 1998), citing **Hamilton v. Southwestern Bell Telephone Co.**, 136 F.3d 1047, 1049 (5th Cir. 1998).

[8] **Hamilton,** 136 F.3d at 1049, citing **Rogers v. International Marine Terminals, Inc.,** 87 F.3d 755, 758 (5th Cir. 1996.)

[9] 42 U.S.C. § 12102(2).

Actual Disability

An impairment, standing alone, does not constitute a disability under the ADA. Major life activities include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.[10] An impairment substantially limits a major life activity if it renders the individual unable to perform a major life activity that the average person in the general population can perform or significantly restricts the condition, manner or duration under which the individual can perform the major life activity as compared to an average person.[11] Whether an impairment substantially limits a major life activity therefore is determined in light of the nature and severity of the impairment, its duration or expected duration, and its permanent or expected permanent or long-term impact.[12] Courts are to look first to whether the impairment substantially limits a major life function other than working, and if there is no evidence of such a limitation, then to whether the impairment limits the major life function of working.[13] The inability to perform a single, particular job does not constitute a "substantial limitation" in the major life function of working.[14] Rather, the impairment must prevent plaintiff form being able to perform a class or range of jobs.[15]

The Supreme Court has recently reviewed the ADA. In **Toyota Motor Manufacturing, KY, Inc. v. Williams,**[18] the court noted that, "when addressing the major life activity of

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[10] 29 CFR § 1630.2(i).
[11] 29 CFR § 1630.2 (j).
[12] Id.
[13] **Hamilton,** 136 F.3d at 1050.
[14] 29 CFR § 1630.2(j)(3)(i).
[15] Id.
[18] [18.534 U.S._____(2002)].

performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job."

Plaintiff was offered employment with defendant conditioned on passing a functional capacity evaluation. Plaintiff alleges that he was required as part of the evaluation to lift one hundred (100) pounds without assistance, which plaintiff was unable to do.[19] Plaintiff alleges that defendant's safety policy prohibits any employee from lifting more than fifty (50) pounds unassisted, and that he met the physical requirements of the job as actually performed by defendant's employees.[20]

Defendant submits the unrebutted testimony of plaintiff that plaintiff was fully active and held various jobs prior to his application for employment, and had not been restricted by any physician. Defendant argues that plaintiff has not demonstrated any major life activity that was affected by his arthritic left knee prior to his application for employment.

The court concludes that plaintiff has shown, at best, that he did not meet the requirements for the single position of pipefitter, not that he was unable to perform the variety of tasks common to most people's daily lives. The fact that these requirements did not coincide with the company's safety regulations does not change this conclusion. The court finds that plaintiff has produced no summary

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[19] Doc. 1, Complaint, para. 9.

[20] Doc. 1, Complaint, para 12-13.

judgment evidence to rebut the evidence offered by defendant that plaintiff suffered no actual disability. Defendant is therefore entitled to summary judgment on the claim for actual disability.

Record of Disability

Having a record of impairment means having a history of a mental or physical impairment that substantially limits one or more of the major life activities.[21] Having no actual disability recognized by the ADA, plaintiff has thus failed to provide summary judgment evidence that he has a record of such impairment that substantially limits a major life activity.[22]

Perception of Disability

An individual is "regarded as" disabled where a covered entity mistakenly believes that:

1) the person has a physical impairment that substantially limits one or more major life activities; or

2) an actual, non-limiting impairment substantially limits one or more major life activities.[23]

In both instances, the covered entity must entertain some misperception regarding the individual-either that he has substantially limiting impairment that: (1) he does

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[21] 29 CFR § 1630.2(k).

[22] **Hamilton,** 136 F3d. at 1051.

[23] **Mason v. United Airlines, Inc.,** 274 F.3d 314, 316 (5th Cir. 2001), citing **Sutton v. United Airlines, Inc.,** 527 U.S. 471, 489, 119 S. Ct. 2139, 144 L.Ed.2d 450 (1999).

not have; or (2) is not so limiting as believed.[24]

Fuzy claims that S & B regarded him as substantially limited in the major life activity of working. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.[25] Further, an employer's belief that an employee is incapable of fulfilling the essential functions of one particular job does not establish that the employer regarded him as being substantially limited in his ability to work in general.[26] There is no evidence in this matter that Fuzy was not qualified for a broad range of other jobs that did not require heavy lifting, or that S & B incorrectly made broad generalizations regarding his limitations.

Fuzy maintains that the administration of the functional capacity evaluation is unrelated to the job of pipefitter and is not required by any business necessity, because the S & B Safety Manual prohibits S & B employees from lifting more than fifty (50) pounds unassisted. The court fails to see the relevance of the fact that the functional capacity requirements differ from the safety manual requirements, and finds that plaintiff has failed to establish a prime facie case of "regarded as" disability under the ADA and Louisiana law.

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[24] Id.

[25] **Toyota Motor Mfg., Ky., Inc. v. Williams,** supra, 29 C.F.R. § 1630.2(j)(3)(i).

[26] **Deas v. River West, L.P.,** 152 F.3d 471, 481-482 (5th Cir. 1998).

Reasonable Accommodation

With regard to plaintiff's reasonable accommodation argument, it is well-settled in the Fifth Circuit that "an employer need not provide reasonable accommodation to an employee who does not suffer from substantially limiting impairment merely because the employer thinks the employee has such an impairment."[27] In the present case, plaintiff sought protection under the ADA's "regarded as" disabled language. While this court has determined that S & B did not regard Fuzy as disabled, even if S & B had regarded Fuzy as disabled, S & B would not be required to provide Fuzy with reasonable accommodations under the ADA.

Conclusion

Accordingly, for the reasons assigned, the motion by defendant, S & B Engineers and Constructors, Ltd. (S & B) for summary judgment (Doc. 11) is hereby GRANTED and this matter shall be dismissed.

Baton Rouge, Louisiana, February 11, 2002.

SIGNED/John Parker
JOHN V. PARKER
UNITED STATES DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA

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[27] **Newberry v. East Texas State Univ.**, 161 F.3d 276, 280 (5th Cir. 1998).

7.0 Field Operations – Policies, Practices And Procedures

7.26 Material Handling

S & B will comply with 29 CFR 1926.953, .250 and .550 regarding material handling, rigging and hoisting.

General

- All materials stored in tiers shall be racked, stacked, and interlocked to secure from collapse or falling.

- Maximum safe load limits of floors with buildings and structures, in pounds per square foot, shall be conspicuously posted in storage areas except at grade or slab levels.

- Aisles and passageways shall be kept clear to provide for free and safe movement of material handling equipment.

- During the course of construction, alterations or repairs, form and scrap lumber with protruding nails, and all other debris, shall be kept cleared from work areas, passageways, and stairs in and around buildings or structures.

- Employees shall obtain assistance in lifting objects in excess of 50 pounds. Powered or motorized equipment should be considered prior to manual handling.

- When two or more employees are carrying objects, each employee should face the direction in which the object is being carried and one person should be designated to verbally direct movement of the object.

Mechanical Equipment

- A crane or cherrypicker's lifting capacity may be adversely affected by inadequate footing and/or unstable ground. Mats of adequate proportions should be used when the stability of lifting equipment is questionable.